

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

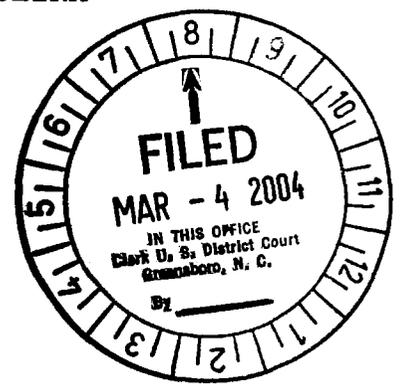
WS & W INTERNATIONAL ENTERPRISES,)
INC., a North Carolina Corporation,)
WINSTON SALEM MINORITY BUSINESS)
ASSOCIATION, a North Carolina)
Corporation, JOE KENNEDY and)
ANGELA LITTLE,)

Plaintiffs,)

v.)

HOUSING AUTHORITY OF WINSTON-SALEM,)
WILLIAM ANDREWS, CHAIRMAN OF THE)
BOARD OF COMMISSIONERS OF THE)
HOUSING AUTHORITY OF WINSTON SALEM,)
in his official capacity, EARNEST)
PITT, VICE CHAIRMAN OF THE BOARD)
OF COMMISSIONERS OF THE HOUSING)
AUTHORITY OF WINSTON-SALEM, in his)
official capacity, LOUISE H. DAVIS,)
MEMBER OF THE BOARD OF)
COMMISSIONERS OF THE HOUSING)
AUTHORITY OF WINSTON-SALEM, in her)
official capacity, BARBARA G.)
WHITE, MEMBER OF THE BOARD OF)
COMMISSIONERS OF THE HOUSING)
AUTHORITY OF WINSTON-SALEM, in her)
official capacity, BRYAN RAINBOW,)
MEMBER OF THE BOARD OF)
COMMISSIONERS OF THE HOUSING)
AUTHORITY OF WINSTON-SALEM, in his)
official capacity, J. REID)
LAWRENCE, EXECUTIVE DIRECTOR OF)
THE HOUSING AUTHORITY OF)
WINSTON-SALEM, in his official)
capacity, AND EAGEN)
ASSOCIATES, INC., a North)
Carolina Corporation, n/k/a Old)
Mill Development, L.L.C., a North)
Carolina Limited Liability)
Company,)

Defendants.)



1:00CV00390

MEMORANDUM OPINION AND ORDER

Eliason, Magistrate Judge

This case comes before the Court on defendants'¹ motion to dismiss for being moot. That motion was filed on October 14, 2003. On November 3, 2003, this Court granted plaintiff's counsel an extension of time to respond to the motion, with the response being due on November 19, 2003. However, no response was filed on or before that date and no response has been filed even at the current time. For this reason, the Court will now consider defendants' motion and will treat it as being unopposed.

Facts and Claims

The facts of the case, as alleged in the complaint and shown by evidence presented by defendants, is as follows. In 1997, defendant Housing Authority of Winston-Salem received a federally funded grant in the amount of \$27 million. This grant was to be used to develop an area of Winston-Salem known as Kimberly Park. The Housing Authority, of which the remaining individual defendants are board members and the executive director, decided that the development was to take place in four phases known as Kimberly Park

¹The motion to dismiss is brought by all of the defendants listed in plaintiffs' amended complaint with the exception of Eagen Associates/Old Mill Development. It appears from the record that Eagen/Old Mill was never served with the complaint. No returned summons is in the record as to this entity, no counsel has entered an appearance on its behalf, and it has made no filings with the Court. Because more than 120 days have passed since the filing of plaintiffs' amended complaint, Eagen/Old Mill will be dismissed as a defendant by the Court under Fed. R. Civ. P. 4(m). For the sake of simplicity, the other defendants listed in the caption, all of whom were served and made appearances in the case, will hereafter be referred to as "defendants."

I, II, III, and IV. Separate, finished buildings were to be constructed in each phase.

Prior to this suit being initiated, bids were taken for contracts having to do with phases I and II of the construction. Plaintiff WS & W International Enterprises, Inc. alleges that it submitted a bid to be the developer associated with the Kimberly Park II project. Plaintiff Winston Salem Minority Business Association alleges that certain of its members were willing to submit bids on other contracts associated with Kimberly Park I and II. Plaintiffs Joe Kennedy and Angela Little are two African American residents of the Kimberly Park area who hoped for jobs in the Kimberly Park Development.

Plaintiffs claim that there were many problems with the bidding and contract procurement process engaged in by the Housing Authority and its board members. They contend that these problems produced an unfair bidding process and eliminated minority owned businesses from contention. Plaintiffs allege that these deficiencies violated the United States Constitution as well as various federal laws and regulations.

Plaintiffs do not request monetary damages in their amended complaint. What they seek is a declaration that defendants' procurement system violated the federal constitution, laws and regulations, an injunction preventing the awarding of any further contracts or services for Kimberly Park I and II until a proper system is implemented, and an injunction that prevents defendants from performing "any additional work or causing to be performed any

additional work" until a proper system is in place. (Amended Complaint pp. 14-15)

Defendants, for their part, have now moved to dismiss this case for being moot. They have submitted affidavits and supporting documentation showing that all construction on Kimberly Park I and II has now been completed and that certificates of completion and occupancy have been issued by the City of Winston-Salem for the buildings that comprised the two projects. they argue that the declaratory and injunctive relief requested by the plaintiffs is now meaningless so that the plaintiffs no longer have a sufficient interest in the relief requested to create a live case or controversy for the Court to decide.

Legal Standards

Defendants request dismissal under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. When such an issue is raised, the Court will construe the complaint broadly and accept all uncontroverted factual allegations as true, but the burden is on plaintiffs to demonstrate that jurisdiction exists. Flue-Cured Tobacco Cooperative Stabilization Corp. v. U.S. E.P.A., 857 F. Supp. 1137, 1140 (M.D.N.C. 1994) (complaint must be broadly construed); Richmond, Fredericksburg & Potomac Railroad Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991), cert. denied, 503 U.S. 984, 112 S.Ct. 1667, 118 L.Ed.2d 388 (1992) (burden is on plaintiffs). Also, the Court may consider some evidence beyond the pleadings without converting the motion to a motion for summary judgment. Richmond, 945 F.2d at 768.

Discussion

The motion to dismiss is unopposed despite plaintiffs having been given an extension of time to respond to that motion. Under this Court's Local Rules, unopposed motions will ordinarily be granted. Local Rule 7.3(k). Defendant's motion can be granted for this reason alone. Still, out of an abundance of caution, the Court will review the pleadings and evidence before it and decide the merits of the case.²

Turning to the merits, this Court does not have jurisdiction over cases which are moot because, when a case is moot, there is no actual case or controversy between the parties. Iron Arrow Honor Society v. Heckler, 464 U.S. 67, 70, 104 S.Ct. 373, 374-375, 78 L.Ed.2d 58 (1983). The existence of an actual case or controversy is a constitutional requirement for jurisdiction. Id. No such case or controversy exists unless a party has an injury for which the Court can grant a remedy. James Luterbach Const. Co., Inc. v. Adamkus, 781 F.2d 599, 602 (7th Cir. 1986). With this in mind, the Court will examine plaintiff's alleged injuries and proposed remedies.

²One reason to provide such a review is that the Court has received a letter from a person who claims to be from the plaintiff Winston-Salem Minority Business Association. This person states that the plaintiffs' attorney closed his office on January 30, 2004. The letter asks that future correspondence be sent directly to the organization and requests an extension of discovery. However, it does not state that any new attorney will be appearing on plaintiffs' behalf and does not mention the pending motion to dismiss. That motion would not be affected in any event because plaintiffs were represented by counsel at the time the response to the motion was due and for some time afterward. Moreover, the correspondent was informed of the deficiency in his submission and the reason for the deficiency, and was given ten days to make a correction. More than ten days have passed and no correction has been made.

Plaintiffs do not allege or request any monetary damages in their complaint. Instead, they ask only for three types of declaratory and injunctive relief. The first of these is a declaration that defendants' procurement system for securing development/partners and awarding contracts violates the United States Constitution and federal laws and regulations. This request for relief is not, by its language, explicitly limited to only the Kimberly Park I and II projects. However, it must be so limited because these are the only projects that the body of the complaint alleges that the plaintiffs have any interest in. The complaint does not claim that the plaintiffs have any interest in any future projects or in any other projects which may be ongoing at the current time. For this reason, their request for declaratory relief is plainly limited to the Kimberly Park I and II projects.

Plaintiffs' two requests for injunctive relief also deal solely with those projects. Their first claim for injunctive relief explicitly limits itself by stating that the Court should enjoin defendants from "procuring any more contracts or services for the development of Kimberly Park I and II . . ." until a proper system is in place. (Complaint at p. 15) Their second is more general, asking that the Court enjoin defendants from "performing any additional work or causing to be performed any additional work until the Court Order is complied with." (Id.) What work or what the work is on is not specified and it is not clear which order must be satisfied. However, reading the demand in the context of the complaint, it is obvious that the work being

referred to is the work on Kimberly Park I and II. Once again, plaintiff's have not alleged an interest in other projects. Presumably, the court order being referred to would be the requested injunction that no contracts be procured on those projects until an appropriate system was in place.

Overall, the important point is that all of plaintiffs' requests for relief are based solely on the Kimberly Park I and II projects. Therefore, the Court will limit its case or controversy review to determining whether any relief connected to those projects can still be afforded to plaintiffs.³

Defendants have submitted affidavits and supporting documentation showing that the units in Kimberly Park I and II have been completed and that certificates of occupancy have been issued for those units. They represent to the Court that no further contracts need to be procured for either project and that both are now complete. (Lawrence Aff. ¶¶ 6-7, Williams Aff. ¶¶ 7-8) At an August 4, 2003 hearing in this case, counsel for defendants made the representation that the work on the two projects was such that the projects were "fully constructed or are operational or are substantially complete at this point." (Tr. of Aug 4, 2003 Hearing, p. 4) Counsel for plaintiffs responded that his clients, based on site visits they had made, believed that construction was

³For the reasons stated above, it appears certain that plaintiffs intended to address their complaint only at the Kimberly Park I and II projects. However, if this is not the case, for instance if they intended to also challenge the Kimberly Park III and IV projects or the procurement system in general, dismissal of the present case will not adversely affect those claims. They can still be brought in another suit as they arise.

continuing at that time and that completion or noncompletion would be a factual issue in the case. (Id. at 4-5)

Having reviewed the record and the evidence, the Court finds that there is no longer any factual dispute as to whether the Kimberly Park I and II projects have been completed. At the time of the August hearing, it appears that there may have been a question based on plaintiffs' alleged observations and defendants' counsel's statement that the projects were complete or "substantially" complete. Such a statement does not rule out the possibility that some contract procurements or work remained so that the case was not truly moot at that time. In fact, the Court notes that a number of the certificates of occupancy submitted by defendants for the Kimberly Park II project were issued after the August hearing, but before the motion to dismiss was filed. In any event, those certificates have been issued so that any factual disputes regarding completion appear to have resolved themselves before the motion to dismiss was filed. Based on this, the Court finds that the Kimberly Park I and II projects are now complete.

The only remaining question before the Court is the effect that the completion of the Kimberly Park I and II projects has on plaintiffs' requests for relief. However, the answer to this question is rather obvious. The Court cannot now enjoin defendants from procuring contracts or from working on the projects. It is true that the Court could declare that the procurement system used by defendants to complete the projects was somehow improper. However, this would give no relief to plaintiffs. In similar

situations involving declaratory or injunctive relief and completed construction projects, several courts have found cases to be moot and this Court agrees with those conclusions. See Bayou Liberty Association, Inc. v. U.S. Army Corps of Engineers, 217 F.3d 393 (5th Cir. 2000); Luterbach, supra; Stoezel & Sons, Inc. v. City of Hastings, 658 N.W.2d 636, 265 Neb. 637 (2003); Winter Brothers Underground Inc. v. City of Beresford, 652 N.W.2d. 99, 2002 S.D. 117 (2002). Finally, at the August hearing, plaintiffs' counsel questioned whether all work was complete, but did not take issue with the proposition that the case would be moot if the work was complete. Accordingly, defendants' motion to dismiss is granted and the case is dismissed.⁴

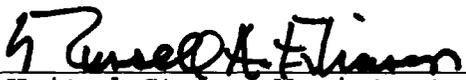
IT IS THEREFORE ORDERED that Eagen Associates, Inc. n/k/a/ Old Mill Development, L.L.C, be, and the same hereby is, dismissed from this case pursuant to Fed. R. Civ. P. 4(m) due to plaintiffs'

⁴There is an exception to the mootness doctrine where a case can be said to be "capable-of-repetition-yet-evading review." Such a case exists where the action challenged by the plaintiffs is of too short a duration to be fully litigated before completion and there is a reasonable expectation that the plaintiffs will be subjected to the same action in the future. See James Luterbach Const. Co., Inc. v. Adamkus, 781 F.2d 599, 602 (7th Cir. 1986). While it is theoretically possible that some or all of the plaintiffs in the present case might have future issues with defendants' policies, there is no sign that those issues could not be fully litigated. For instance, the projects at issue here took several years to complete. Still, plaintiffs never sought to temporarily enjoin the projects. There is no reason why they could not at least pursue this remedy if future cases are brought. For this reason, the exception to the mootness doctrine does not exist in this case.

Additionally, no great detriment will befall plaintiffs from having this case dismissed because it does not appear that significant amounts of time or energy have been invested in the case. Also, the applicable regulations or law may have changed and defendants' procurement system itself may have changed during the time that has passed since the case was filed. For all of these reasons, any claims that may exist outside of those related to Kimberly Park I and II are better handled in a separate lawsuit.

failure to effect service within 120 days of the filing of their amended complaint.

IT IS FURTHER ORDERED that the remaining defendants' motion to dismiss (docket no. 18) be, and the same hereby is granted, and that this action is dismissed in its entirety.


United States Magistrate Judge

March ^{4th}, 2004